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Justice in and of the European Union

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Abstract

This paper examines the strengths and limitations of the idea of justice as a way of exploring and assessing the legitimacy of the EU. Justice is either conceived of 'in' various specialist policy sectors (environmental, security, gender etc.), so responding to a disaggregated notion of the EU polity and its legitimacy. Or justice is conceived of as a feature 'of' the EU as a whole - so responding to a holistic notion of the EU polity and its legitimacy. On the one hand, the disaggregated approach can at best be supplementary to the holistic approach, since, as the European financial crisis has once again vividly exposed, the EU can and does develop 'joined-up' policy with significant cross-sectoral consequences across its 28 member states. On the other hand, a more rounded idea of justice stands as a means of collective self-authorisation that complements democracy - itself indispensable but problematic in the EU context - as a way of thinking of legitimacy in polity-holistic terms. In particular, the recent popularity of a conception of justice as a 'right to justification' seeks to combine the 'democratic' merit of equal subjective right with an objective concern for good public-regarding reason. The paper concludes by discussing the strengths and limitations of the idea of justice as the right to justification.

Keywords

Justice, Justification, European Union, Democracy, Delegation, Collective Self-Authorisation, Legitimacy

Justice in and of the European Union

Neil Walker

Introduction: In the name of European justice

There are some good reasons why we might find justice attractive as an organising concept as we seek to work out what is required for the European Union to achieve and maintain legitimacy before its people(s), and as we endeavour to assess how, where and why it is falling short. These reasons, however, do not offer any guarantees that justice will *in fact* measure up to the task of constructive critique and critical reconstruction. Indeed, some of the factors that might persuade us to invest in the language of justice in the EU context also reflect and reinforce certain shortcomings in the capacity of the 'j' word to supply a reliable compass of political morality for the world's first post-state polity. In what follows, I will elaborate these points. I will conclude, however, that, while we should be ever alert both to the temptation of overstating the claim of justice as some kind of master discourse in the European context, and to the danger that such a claim merely symptomises rather than resolves the puzzle of supranational legitimacy, there is nevertheless considerable merit in persevering with the project of examining the EU in the name of justice

The analytical key lies in the potential of the language of justice to impact on the EU legitimacy debate at two levels. It is this double possibility, but also the complexity, even confusion, of the relationship between these two levels, which underscores the promise, but also the pitfalls, of the EU's justice discourse. To understand how this argument proceeds, we must begin with certain peculiarities associated with the concept of justice itself.

The Agility of Justice

Justice is an extremely agile concept. By this I mean more than that it can be shaped and reshaped to mean different things to different people. That certainly is the case. There are many different theories and conceptions of justice, and these are often mutually inconsistent. Justice has no fixed

meaning, no settled criteria. It is patently a contentious, and, indeed, a contested concept.¹ Agility, however, suggests something beyond mere flexibility and diversity of theoretical approach towards a common object. It concerns, in addition, the ability of the idea of justice to move nimbly between various sites and to travel easily up and down the scale of abstraction; that is to say, its capacity to refer to quite different objects, or focal concerns, and to sound at various quite distinct stages of remove from social and political practice. In particular, justice can refer variously to individuals, or to relations between individuals or among small groups, to particular sectors or segments of common life and common public policy, to certain specific social or political institutions, to the society or the polity as a whole, or, indeed, to the totality of relations across the planet. In a nutshell, justice can be *personal*, *interpersonal*, *sectoral*, *institutional*, *polity-holistic*, or *global*.

That justice can be understood as a personal trait is a position that goes back as far the classical treatment of Plato and Aristotle. For the Greek philosophers the just individual is a virtuous individual, someone who is guided by a vision of the good. The idea of interpersonal justice, too, has Aristotelian roots. The dyad, or the small group, provides the most immediate context and measure of personal virtue, the setting within which the credentials of the just individual are most directly put to the test. Indeed, it is in the writings of Aristotle that we find the first formulation of the notion of commutative justice - of just action and just consequences considered within the frame of interpersonal transactions. And it is in these same writings that we find the first articulation of the familiar, field-defining distinction, more commonly associated with Aquinas, between commutative justice as the standard appropriate to the micro-context of exchange relations, and distributive justice, which is a standard more appropriate to the macro-context of wider societal relations.

Sectoral justice already assumes just such a macro-context of the just allocation of benefits and burdens across a broader population. The object of analysis here is a particular domain of practice, and of practical consequences. Sectoral justice, then, can refer to a clearly defined social constituency - justice, say, for university students, or for war veterans, or for dementia sufferers. Or, more broadly, it can identify a significant dimension of societal relations and public policy - from environmental justice, or health care justice, to something as expansive and open-ended as economic or social justice. An assessment of sectoral justice will often require us to look at the contribution of relevant sectoral institutions, but we are also interested in the justice of a specific category of institutions for reasons apart from a general sectoral audit. These are the public institutions concerned with the provision of Civil and Criminal Justice - police, courts, prisons and

¹ See e.g. Neyer, this volume

the like. For these institutions, justice is such a focal concern that it provides the language of their official (and everyday) description. That is to say, these are nominate institutions of Justice - public bodies directly charged with the responsibility of delivering or guaranteeing at a societal level a particular range, type and pattern of just exchanges and outcomes, rather than institutions that exist for other dedicated purposes but whose objectives may also be evaluated in terms of their broader contribution to sectoral justice, or to polity-holistic justice.

Polity-holistic justice, as the label suggests, is concerned with the justice of the political community as a whole. In Rawls's famous formulation, it may only be the "basic structure"² of the relevant polity and society with which such a general theory of justice is concerned – the political constitution, the legal system, the economy, the family, and so on. But what distinguishes this perspective from the sectoral or any other approach is that it is concerned with the general responsibility of a political community to promote or secure justice for and amongst its members and associates. Quite how far that responsibility extends – how 'basic' should be the basic structure - is itself controversial between different conceptions of justice, but what all polity-holistic conceptions hold in common is a concern with the overall framework, scope and pattern of the polity's contribution to justice within the relevant community, and so to the justice – or justness of the polity as a whole.

Global justice, finally, extends even further than the polity. It concern the entire globe, and, to develop a distinction already introduced, it can be conceived of either in holistic terms – with the basic structure of global institutions and arrangements as a whole , or, more commonly, as a series of sectoral projects, from global peace and the global environment to migration policy and access to basic material resources.³

The agility of the justice concept makes it particularly well adapted to the situation of the European Union. Granted, one influential recent critique of the European Union holds that its public culture has been progressively concerned too much with the rhetoric of values and too little with the

² J. Rawls *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

³ See e.g. T. Nagel , "The Problem of Global Justice (2005) 32 *Philosophy and Public Affairs* (No 2).

cultivation of individual virtue⁴ – including, presumably, the virtue of justice. Yet, however we judge this criticism, in other respects the European Union appears to be a fertile environment for considerations of justice. The four freedoms that lie at the Union's core can all be seen as particular forms of transactional freedom (in respect of the offer and receipt of goods, services and capital, and with labour mobility), and, as such, they are concerned with a certain (if far from uncontroversial) conception of justice in *interpersonal* exchange relations. Less contentiously, the European Union endeavours to make a contribution to various forms of *sectoral* justice – environmental, gender, disability, educational, health care etc - as the upper tier of governance and regulatory capacity within a multi-level continental system. Furthermore, the Area of Freedom, Security and Justice, which has been at the cutting edge of the EU's development beyond social and economic policy for two decades now, provides a clear and prominent example of justice as an *institutional* ideal.⁵ And if we consider the EU's external relations, the past 20 years has again⁶ witnessed a significant development of that profile, including its key input, for better or worse, within an even more extensive multi-level governance framework into various sectoral dimensions of *global* justice, such as migration, food security and climate change.⁷

It is at this point the two-level quality of EU justice discourse comes into focus. To draw upon the terminology of my title, the above analysis demonstrates how all manner of forms and types of justice - interpersonal, sectoral, institutional and global - are relevant to and treated *in* the European Union by its various organs and through its various forms of law and policy. Yet, these examples, for all their dense versatility, do not directly and do not obviously speak to the justice, or justness, *of* the European Union as a whole. For that, we need to return to the final element of justice's flexible remit, namely justice considered in *polity-holistic* terms.

⁴ See e.g. J. Weiler "60 Years since the first European Community- Reflections on Political Messianism" (2011)22 EJIL 303-311.

⁵ See e.g. Douglas-Scott, this volume

⁶ Given early impetus by the 1992 Treaty of Maastricht's development of a Second Pillar of Foreign and Security Policy alongside its Third Pillar of Justice and Home Affairs. On the expansion of the EU's outward-looking global remit more generally, see Gráinne de Búrca, Europe's Raison D'Etre, in Dimitry Kochenov and Fabian Amtenbrink (eds) *The European Union's shaping of the International Legal Order* (Cambridge: CUP, 2013) . 2013).

⁷ See e.g. J Scott and L. Rajami Climate Change Unilateralism' (2012) 23 European Journal of International Law 469 .

The elusive legitimacy of the EU

It is here, however, that we begin to glimpse some of the potential shortcomings and pitfalls of the EU's discourse on justice. On the one hand, under the various categories considered above, the language of justice is patently capable of making a rich contribution to a full and rounded evaluation of the EU's role in national and transnational affairs. On the other hand, as we shall see, the question of the general polity legitimacy of the EU poses special difficulties, and these are reflected in the treatment of justice, perceived through a polity-holistic lens, as a factor in addressing that question.

The special problems of polity legitimacy are of two types, though they are closely related, and, indeed, shade into one another.⁸ In the first place, the very question of whether the EU qualifies as a self-standing polity, such that it makes sense even to think of it as the subject of general legitimacy claims or challenges, is controversial. More specifically, it is not clear that the EU is the kind of entity that meets the necessary minimum external and internal identity criteria – both sufficiently autonomous from other entities and sufficiently integrated in its internal structure and activity profile – that would make appropriate its subjection to the same kind of appraisal of its overall acceptability to its citizens and denizens as other discrete political communities, notably states. Can we even hold that the EU has a general responsibility to promote or secure justice for and amongst its members and associates, and that it should be judged in accordance with its fulfillment or otherwise of that responsibility? And in the second place, to the (inevitably controversial) extent that the EU may be regarded as a self-standing polity, and the previous question can in principle be answered in the affirmative, as there is no supranational genus of which it is a species, the relevant standards by which its legitimacy should be assessed are also deeply uncertain and contentious. If it is at all a distinct polity, it is certainly a highly *distinctive* kind of polity, and so how we go about measuring the legitimacy of its contribution to the world remains a matter of deep disagreement.

How, precisely, does the elusive quality of the EU's general polity legitimacy affect the place of justice – such a familiar discursive theme *in* various of the spheres of action of the EU – at that broader polity-holistic level of debate. To answer this, we need to sketch out a taxonomy of the

⁸ See e.g., N. Walker, "Europe's constitutional momentum and the search for polity legitimacy" (2005) 3 *International Journal of Constitutional Law* 211-38.

candidate ways of addressing legitimacy within the EU that is sensitive to the deeper contestation over the very idea of polity legitimacy.

Four Approaches to Polity Legitimacy

Four broad approaches can be identified, these located along a spectrum of greater or lesser scepticism about the very idea of polity legitimacy in the EU context. On the sceptical side of the divide, we can identify *disaggregated* and *dependent* approaches, while on the polity-affirmative side we can identify *democratic* approaches alongside other approaches to polity legitimacy based upon *collective self-authorisation*. Pursuing a strategy of elimination, let us begin by looking at the two approaches – one from either end of the spectrum - that do *not* directly engage questions of justice. On the sceptical side, there is the dependent approach, while on the affirmative side there is the democratic approach.

The very conditions of emergence of the EU ensured a strong early bias towards dependent forms of legitimacy. Born as an international organisation in the Treaties of Paris and Rome, albeit one with an unusually 'thick' and penetrative policy remit, for its first 30 years the EU tended to be justified in official discourse in terms that reflected the externality of its founding mandate and momentum. Lacking its own conception of popular sovereignty - of independent *pouvoir constituant*, its legitimisation strategies were instead linked to various pre-given sources or standards. It was justified primarily in intergovernmental terms, as the delegated 'creature' of its member states.⁹ In turn, legitimisation through the indirect authorisation of the member states encouraged or accommodated other approaches that stressed the modesty, non-contentiousness and containable character of the supranational remit. The EU was treated variously, and often cumulatively, as the recipient and "trustee" of a clear and clearly delimited legislative or policy mandate,¹⁰ as the disinterestedly efficient or expert "technocratic"¹¹ instrument for the realisation of a set of

⁹ See e.g. P. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation State* (Oxford: OUP, 2010).

¹⁰ See e.g. G. Majone "Delegation of Powers and the Fiduciary Principle" in his *Dilemmas of European Integration* (Oxford: OUP, 2005).

¹¹ C. Lord and P. Maignette "E Pluribus Unum? Creative Disagreement about Legitimacy in the EU" (2004) 42 *Journal of Common Market Studies* 183-204.

common commitments, or as the indispensable transnational means to pursue a range of shared interests of national states and citizen towards a positive net outcome or “output”¹².

However, the legitimacy of a delegate, or of a fiduciary, or of an efficient or epistemic authority, depends on the continuing control of the principal, the clarity of the mandate, or the reducibility of policy competence to special knowledge, experience or expertise alone. And as is well-known, the adequacy of all of these justificatory models has been challenged by the expansionary dynamic of the Union. They have become less plausible claims in a supranational polity increasingly attenuated from national control, with an ever broader and deeper policy agenda, with multiple veto points that work against any rolling back of community competence, and with a less comfortable “permissive consensus”¹³ amongst key national elites across an ever larger Union.

One response to these developments has been a gradual tendency to view the overall legitimacy of the EU in original rather than derivative terms, and as a matter of resort to internal rather than external criteria. And by that path, with more or less explicit reference to the state as a justificatory template,¹⁴ *democracy* has been treated by many as the natural route to polity self-legitimation. As a relatively autonomous polity with an increasingly capacious and contentious agenda for the allocation of rights, risks and resources, the key to its legitimacy, on this view, lies with the collective self-determination of all those affected by the allocation of rights, risks and resources.

But such an approach has itself long been vulnerable to various objections. One objection questions its basic plausibility, insisting upon the resilience of the so-called democratic deficit. It stresses the record of voter apathy and weak transnational political party organisation even in the face of the progressive empowerment of the European Parliament, indicates the continuing marginalisation of national Parliament despite recent subsidiarity-inspired reforms, emphasises the limited transparency and poor accountability of Council and Commission, and can cite the failure of quasi-populist initiatives such as the (Constitutional) Convention on the Future of Europe to find or nurture a fertile democratic subsoil. On this view, the lack of a European *demos* culturally self-understood as such means that the motivational basis for a genuinely committed and contestatory

¹² As in Fritz Scharpf's “output legitimacy” *Governing in Europe: Effective and Democratic?* (Oxford: OUP, 1999).

¹³ See e.g., I. Down and C. J. Wilson “From ‘Permissive Consensus’ to ‘Constraining Dissensus’: A Polarizing Union?” (2008) 43 *Acta Politica* 26-49.

¹⁴ See e.g. F. Mancini “Europe: The Case for Statehood” (1998) 4 *ELJ* 29-42; E. Eriksen *The Unfinished Democratisation of Europe* (Oxford: OUP, 2009).

democracy does not exist or is significantly deficient. A second objection returns to some of the themes of the EU as a dependent polity and questions the appropriateness in general normative terms of a solution which foregrounds democracy. On this view, a key danger of supranational democratic overreach is that euro-democracy stands in a negative-sum relationship with - and so risks curtailing and chilling - democracy in its culturally more appropriate and more plausible forum of the nation state(s). A third and related objection holds that in its appeal to the unfettered authority of the collective will, the argument from democracy fails in any case to capture the more limited and specialist mandate of the EU as compared to the unlimited political mandate of the state. In terms of its basic architecture and its place in the overall structure of national, continental and global political authority, the EU is simply not a state, and so the kind of argument for a thoroughgoing democratic ethos and audit that attends an entity whose very *raison d'être* is one of collective self-determination should not apply.¹⁵ In a nutshell, then, the argument from democracy as a pure alternative to the historically influential dependent approach to polity legitimacy is subject to profound challenge on each of motivational, normative and structural grounds.

It is against this background of an unresolved and deeply unsettled legitimacy discourse that arguments from justice begin to come into their own at both ends of the spectrum. On the one hand, the disaggregated approach to legitimacy focuses on the many particular claims to legitimacy that the EU might make. Whereas the dependent approach to legitimacy *does* address the EU as a singular entity, albeit deploying a thin and derivative model that takes a modest view of the EU's polity status, a disaggregated approach does not concern itself at all with the polity-holistic dimension. That is to say, it does not seek to assess the legitimacy of the EU in accordance with a single test and standard, but instead hones in on particular aspects of its work and applies different criteria to each. What justifies the EU from this perspective is how its various functions and resources contribute to different policy objectives and ethical aspirations in the transnational sphere more generally. The EU, then, on this view, is treated, implicitly or explicitly, as a mere bundle of capacities linked to more or less discrete and diverse objectives, rather than a singular entity whose justification *as such* is a politically salient or even meaningful question.

Though it is by no means the only language that may be adopted in accordance with this methodology, a focus on the many forms of justice pursued *in* the EU, interpersonal, and, in particular sectoral, institutional and global, clearly fits with the disaggregated approach. Justice

¹⁵ See e.g., A. Moravcsik, "What can we learn from the collapse of the European Constitutional Project?" (2006) 47 *Politische Vierteljahresschrift* 2.

here provides the double function of supplying an affirmative - and superficially consistent - moral language, but one that lowers the stakes for the EU to a test, or series of tests of consequential benefit. The EU's various institutional and policy platforms get judged for the various things they *do*, rather than the EU as a whole getting judged for what it *is*. Indeed, from this perspective, the ontological question of the basic nature and purpose of the EU is entirely missing, and the EU's overall contribution, insofar as it is even a consideration,¹⁶ can only be measured as the sum of its various parts.

In the final analysis, however, the disaggregated approach is vulnerable to some of the same objections as the dependent approach. An approach that unbundles the EU's various functions and capacities may tell us a lot about the justness of these various functions and capacities, but against a backdrop of the EU possessing broad and expanding multi-functional institutional capacity, including significant scope to interfere with the multi-functional capacity of States this can be no substitute for an approach that looks at its role and contribution in 'joined-up' terms. And so, reverting to the other end of the spectrum, we arrive at a consideration of those approaches, other than a pure democratic approach, which view the legitimacy of the EU in original or independent terms. Here, polity legitimacy is a measure of how the EU justifies itself as a matter of self-authorisation, speaking for and to its own collective constituency in light of its own self-standing role and contribution as a polity rather than in terms dictated by external constituencies or standards.

In this final category we find various attempts to discover a register of legitimation for the EU through identifying a bespoke set of values, ideals or aspirations that define European supranationalism on its own special terms and with reference to the common aspirations of the constituent European people(s). One well-known such position goes back to the founding post-War mission of the EU to promote peace and prosperity.¹⁷ However, as the chief sponsor of this approach would be the first to admit,¹⁸ in an age of relative prosperity, however (and , since the financial crisis, increasingly) unevenly distributed, and in which the sounds of war are heard only from beyond the EU's external borders, and in a time where the jurisdiction of the EU stretches well

¹⁶ I do not mean to imply that those who talk about justice in this way necessarily intend to take a disaggregated approach to polity legitimacy, and in so doing to *dismiss* the significance of more holistic approaches. They may or may not so intend, but the language of differentiated justice can certainly lend support to such a view. On the general trend to within EU policy studies towards disaggregating questions of legitimacy and effectiveness, see e.g. M. Jachtenfuchs, "The Governance Approach to European Integration" (2009) 38 JCMS 245-64.

¹⁷ See e.g. J. Weiler *The Constitution of Europe* (Cambridge: CUP, 1999).

¹⁸ See e.g. Weiler, above n4.

beyond the basics of wealth-creation and the avoidance of conflict, something broader and more responsive to the contemporary situation of the European continent is required.

It is unsurprising that a series of renewed efforts to think about the legitimacy of the EU in terms of a morally articulate form of collective self-authorisation have focused on matters of justice. On the one hand, unlike the derivative or disaggregated approaches, the invocation of justice implies an original form of legitimacy.¹⁹ A claim to the justice of a polity or of its institutions is a 'first' or foundational claim. It cannot be 'read off' from some other source, but must instead locate the polity itself as the "primary agent"²⁰ or author of its own conception of justice. Yet, on the other hand, as compared to the pure democracy-centred approach, the invocation of justice suggests a basis for legitimacy which can at once be both more specific *and* more universal; more customized to the peculiar needs of the EU since what is 'just' is necessarily tailored to context, as well as more objectively defensible and trans-contextually resonant - the claim of justice being one that also implies adherence to certain general and invariant standards.

Yet justice, if it is to be appropriately customized and sufficiently attuned to the situation of the EU as a self-authorizing project, cannot be seen as a replacement for European democracy. Rather, it must be seen as a complementary imperative - as something that operates alongside democratic mechanisms or, at least, is tailored in such a way that it exhibits the kind of responsiveness and respect for political equality that we associate with democratic self-rule.

It is with this vital but delicate balance that recent attempts to redraw justice as a 'right to justification' are concerned.²¹ They combine the democratic spirit of equality of subjective 'right' with the objectivity of good reasons implicit in the notion of a process of justifying political action to all affected. In Rainer Forst's original formulation of the justice-justification nexus, justice refers to "the human capacity to oppose relations of arbitrary rule or domination".²² What he calls

¹⁹ See A. Williams *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge: CUP, 2010) ch.8.

²⁰ O. O'Neill "Agents of Justice" in A. Kuper (ed) *Global Responsibilities* (London: Routledge, 2005) , discussed in A. Williams above n19, 298-9

²¹ See R. Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (New York: Columbia University Press, 2007); J. Neyer *The Justification of Europe: A Political theory of Supranational Integration* (Oxford: OUP, 2012). See also, the original EU-centred exchange, J Neyer "Justice, not democracy; Legitimacy in the European Union"; 2010 48 JCMS 903-921; and (from a critically democratic perspective), see D. Nicol's reply, and the riposte by J. Neyer 2012 50 JCMS 508-522, 523-529. See also contributions of Forst, Neyer and Nicol to the present volume.

²² This and following quotes are taken from his synoptic statement, "Transnational Justice and Democracy" *Normative Orders Working Paper 4/11*

"the principle of general-reciprocal justification" is, he argues, the only means by which justice can be realized. That principle holds that "every claim to goods, rights or liberties must be justified in a general and reciprocal manner, where one side may not simply project its reasons onto the other but must justify itself discursively." Such an approach stresses the priority of identifying such contexts or sites of 'general-reciprocal justification' as are associated with deeply recursive relations of power, with the EU clearly providing one such recursive context.

Forst, many of whose ideas have been adapted to the European context by Jürgen Neyer,²³ clearly draws upon a Habermasian tradition of communicative rationality to flesh out a sense of communal justice. What matters, at root, is not the particular institutional form of the 'give and take' of public reason, but the underlying principle of general and reciprocal justification itself. We may avoid, then, the fetishism of certain supposedly paradigmatic institutional forms of 'democracy' whose plausibility and suitability in the EU context may be limited, such as a fully-fledged assembly democracy and Parliamentary executive, provided that the underlying principle of justification is respected. Equally, we must avoid the fetishism of discourses of expert rationality within specialist epistemic communities, if such rationality is not tested in sufficiently general and reciprocal manner with those it affects.

Yet, in the final analysis, the right to justification operates at too high a level of abstraction to provide, on its own, a compelling answer to the questions of justice in the EU. This, indeed, is evident in the ongoing disagreement between Forst, Neyer and others over the extent to which and ways in which the right to justification can and should incorporate democratic imperatives.²⁴ If we think back to the motivational, normative and structural problems that attend the problem of supranational democracy, none of these disappears just because democracy is now blended with considerations of justice. Indeed, for Neyer especially, procedures of justification go a long way in eclipsing more familiar forms of democracy in the EU. In particular, the right to justification cannot fully 'square the circle' of legitimating a polity where we continue to lack common agreement over and commitment to the kind and extent of polity autonomy it should boast or an overlapping common sense of the forms and limits of its legitimate encroachment on national democratic forms.

²³ See n21 above

²⁴ See n21 above

In some respect, the right to justification may seem to promise progress without having to solve fundamental questions about its democratic pedigree and prospects. In particular, an emphasis on the right to justification is salutary in questioning the privileging of the macro- over the micro-level that we often find in institutional analysis. It tells us that we should oppose, overcome or avoid relations of arbitrary rule or domination wherever they arise, and so do so in all the countless and variously configured sites of decision-making in the EU - in Comitology committees and in agencies, in the OMC and in national implementation contexts, as much as in the 'high' institutional sites of Commission, Council, Parliament and Court. What matters is the particular context and 'community' of affected persons for any particular policy or decision, and in tracking the countless such communities of the affected, we can deconstruct the singular community of the EU into its many overlapping instances.

Yet this is true only up to a point. As we have already seen, we cannot reduce the legitimacy of a polity to the aggregation of its component capacities and competences, and an appeal to the institutional diversity of the EU only takes us so far. Even in a broadly ramified and weakly centralized polity such as the EU, the macro-level of policy choice retains a steering capacity, and this demands its own 'right to justification' at the macro scale. The Euro crisis and the move in the Council towards a strong form of "executive federalism"²⁵ - discretionary in scope, deeply penetrative in reach, and "unbalanced"²⁶ both in its continued emphasis on market freedom over social provision and in the transnational distribution of its burdens - as part of a new cycle of "integration by fear"²⁷ in response to that crisis, supplies vividly renewed testimony to this. The EU, more than ever, is palpably more than the sum of its disparate parts, its central institutional settlement requiring its own justification. And certainly Forst himself, at least at the level of general theory, appears to accept this when stating that the conceptual task of constructing and maintaining a "basic structure of justification" in any particular context is typically given concrete and resilient institutional form in a democratically redeemable "justified basic structure" which applies recursively across space and time in similar contexts.²⁸

²⁵ See J. Habermas, *The Crisis of the European Union: A Response* (Cambridge: Polity, 2012)

²⁶ See M. Dawson and F. De Witte, "Constitutional Balance in the EU after the Euro-Crisis" (2013) 76 *Modern Law Review* 817; see also Wilkinson, this volume.

²⁷ J. Weiler "Integration Through Fear" (2012) 23 *EJIL* 1-5.

²⁸ N22 above

Justifying Justification

I began by suggesting that justice possessed certain strengths but also significant limitations as a tool of normative analysis for the European Union. As we have seen, justice as a low-tariff, context-specific concept - the justice *in* the European Union of my title - can be a very incisive instrument, provided its disaggregated parts are not understood as fulfilling the function of polity-holistic legitimation. In contrast, justice as just such a high-tariff, polity-holistic ideal – the justice *of* the European Union of my title - tends, by its abstractions and through its contestations, to highlight rather than resolve the more fundamental question of polity legitimation.

Yet, as I have also sought I argue, the kind of democracy-supplementing substantive ideal of collective self-authorisation that the notion of justice - and, in particular, a democratically sensitive conception of justice as an encompassing procedural right to justification - seeks to supply, seems to be the only cogent way of thinking about polity legitimation in the EU. That it cannot easily reconcile democracy with the peculiarities of supranationalism, therefore, is no reason to dispense with justice discourse. Rather, its very capacity to illuminate the heart of the European problem is a good reason to persevere with it.

In so doing, let me conclude by suggesting how we might pursue one more of Forst's insights. Forst's is an ideal theory consciously targeted at non-ideal circumstances. He describes justice as a "recuperative institution"²⁹ – with communities of justice throughout history *typically* constituting themselves not in anticipation of new webs of social and political relations but in response to and so "*through* existing relations of rule or domination". In other words, the EU, just like many states, was born unfree and 'unjustified'. And, again like many states, its expansion in practice has tended to outpace and evade the constantly adjusting reach of its procedures of justification. It follows that if the continuous attempt to 'recuperate' lost ground is the normal dynamic of an expanding right to justification, there is no need *in theory* to judge the EU as a pathological instance.

There is no reason in principle, therefore, to see the EU as an unprecedented or irremediable case of original (or cultivated) political sin. It may lack the traction of overlapping common sense of its polity potential that aids the development of a strong sense of common political motivation, and it

²⁹ *Ibid*

may have to face the complex algebra, and sometimes debilitating political gridlock, of facing up to multiple avenues of claims to democratic 'recuperation' - national and supranational - simultaneously. The failure of the first Constitutional project a decade ago and the ongoing crisis of common commitment and confidence around the Euro today, certainly provide vivid testimony to this. But the very idea of 'recuperation' as the wellspring of politics - as the basic condition of political action - alerts us to the fact that for as long as Europeans remain deeply implicated in common action - and they have never been *more* mutually implicated - then the need and the impulse to recuperate will remain. And this leaves us with no alternative but to continue to seek to fashion a basic structure of political institutions that satisfies the right to justification of all Europeans.³⁰

³⁰ For a view which seeks to pursue this through the revival of a constitution-making project, see my "The European Union's Unresolved Constitution: in M. Rosenfeld and A. Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP, 2012) 1185-1208.